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SUBJECT: IPR ISSUES IGNORED BY FSM GOVERNMENT; POPULATION DOESN'T
ACCEPT THAT PIRATED DVDS ARE ILLEGAL

1. (SBU) SUMMARY: The only movie theater in the FSM may close its doors because it cannot compete against readily available pirated DVDs. Pohnpei State and the National Attorney General Offices concede that pirated DVDs are easy to obtain, but neither plans to take any action to limit their distribution. The state contends that the theater owner should file a complaint in the courts, which the owner's attorney believes they could not win. End Summary.

Movie Theater Raises Concerns

2. (SBU) On November 5, Brian Etscheit, the owner of the only movie theater within the FSM, Pohnpei Cinema, told Econ/ConOff that he may have to close. The theater is located approximately 400 meters from the U.S. Embassy in Pohnpei. Etscheit stated that he cannot compete with the pirated DVDs that are now readily available throughout Pohnpei. The theater previously made about \$10,000 a month and was able to cover all of its expenses. Etscheit contemplated projecting pirated DVDs onto his screens, noting that pirated movies arrive in the FSM before original movies and the equipment to project the DVDs are cheaper than operating the current equipment. However, on the advice of his attorney, he decided not to pursue this option.

3. (SBU) By 2005 the last DVD/VHS store renting licensed movies, Movie Land, switched to pirated DVDs. The number of visitors to the theater has dropped to such a point that Etscheit is now losing money on the theater. His family asked that he keep the theater open and is providing financial support. (Note: The Etscheit family owns a number of businesses that are doing well, including an ACE Hardware and a grocery store. End Note.) Despite the support, Etscheit is already cancelling some showings simply due to lack of customers. (Note: During some showings Econ/ConOff was the only person in the theater. Others in the expat community cite similar experiences when going to watch popular movies that are still playing in U.S. theaters. End Note.)

FSM's IPR Laws

4. (U) Code of the FSM, Title 35 explicitly protects copyrighted material. Section 123 of Title 35 states "any person who infringes a copyright willfully and for purpose of commercial advantage or private gain shall be fined \$10,000 or imprisoned for not more than one year, or both." Per the World Intellectual Property Organization, the only IPR related treaty that the FSM has signed, but not ratified, is the Berne Convention.

IPR Enforcement Unlikely

5. (SBU) Econ/ConOff met with Pohnpei State Attorney General

Scott Garvey (Amcit) and representatives for the National Attorney General's Office, Chief of the Division of Law Johnson Asher and Daniel Rescue Jr., on November 6. Garvey explained that responsibility for IPR issues rests at the national level and that per the FSM Constitution National Attorney General "had exclusive rights only on what was made in the FSM." There is no provision regarding materials copyrighted outside the FSM. At the state level, there is some carry over from pre-1983 Trust Territory regulations. According to Garvey, Pohnpei carried out a "codification of the common law," which basically focused on preventing forgeries. He added, and Asher confirmed, that the FSM does not have the capacity to address patent issues.

¶6. (SBU) Garvey went on to say that, in his view, the FSM has purposefully kept some aspects of its IPR legislation weak. For example, the FSM has made efforts to limit the ability of franchises to operate in the FSM. Franchises have no trademark protections. There is a "Wall Mart" and a "Best Buy" store in Pohnpei, but they are not affiliated to the U.S. brands. The local NAPA and ACE Hardware stores, however, are tied to their U.S. counterparts. If an unaffiliated NAPA or other company were to open, it is unclear if the original stores would have any protection on using the name exclusively.

¶7. (SBU) Asher and Rescue confirmed that there have been no trademark or copyright infringement prosecutions in the FSM to date. Commenting specifically on the abundance of pirated DVDs within the FSM, Rescue stated people just are "not aware of the law." If the copyright laws were ever enforced, people would quickly change their habits concerning pirated DVDs. Asher conceded that perhaps the FSM should put some effort into public education on the matter. These views coincided with Etscheit's comments that if the government made some effort to highlight

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the illegality of pirated videos he would be able to compete. Etscheit believes even minimal fines or confiscation of some of the pirated DVDs would make a dramatic difference.

¶8. (SBU) When asked why there had been no prosecution of piracy cases to date, Asher stated that there is no case history for his office to rely upon. Rescue opined that if Etscheit were to bring a case to court, it might create the case history on which the state could base future actions. Asher cautioned, however, under current FSM law the courts may decide that the original authors would have to bring the case to court. Etscheit, as a theater owner, does not have the legal standing to file a complaint.

¶9. (SBU) Asher and Rescue agreed that they would like to see a case brought before the FSM courts on copyright protection, saying the judiciary needs to address the issue. The only option they currently see is for producers, of one of the films shown at Pohnpei Theater, to grant permission to Etscheit to represent the producer's interests in the FSM courts. Asher and Rescue, however, are unsure how that would proceed in court.

¶10. (SBU) Etscheit, through his Attorney Stephen Finnen, tried to raise his concerns with the National Attorney General. In an October 23, 2008 letter to FSM Attorney General Maketo Robert, Finnen asked that the "FSM take action on this issue." At a minimum, Finnen requested the Attorney General's "opinion on the enforceability of overseas copyright laws in the FSM." To date, there has been no response beyond stating that he would instruct Asher look into the matter.

¶11. (SBU) During a November 12 meeting, Finnen explained why Etscheit had not gone to court. He, along with the state and national Attorney General Offices, were unaware of the FSM's obligations under any international treaties to protect foreign copyrights. In addition, in any civil trial Pohnpei Cinema would have to prove damages. Etscheit would be unable to provide baseline information comparing Pohnpei Theater ticket sales when movies are available on pirated DVDs vice when pirated DVDs are not available (every movie is available prior to the film's release in Pohnpei). There is also a question of

Etscheit's "standing;" it is not clear that he can bring the case forward.

¶12. (SBU) According to Finnen the goal of any case would be for Pohnpei Theater to be able to operate as a legitimate and hopefully profitable business. Criminal enforcement against those pirating DVDs is the one measure he thinks would accomplish that goal. Given the current legal climate in the FSM, Finnen does not anticipate positive changes anytime soon.

Comment

¶13. (SBU) The local rumor mill is that the FSM does not want to enforce copyright laws. There is no mechanism to copyright material within the FSM; therefore, all copyrights are foreign owned. More to the point, the government seems to see the multitude of stores selling pirated DVDs as legitimate businesses that are providing employment in and service to the local community. Without any push from representatives from outside the FSM, Post anticipates no movement to protect foreign copyrights within the FSM. Thus, the only way Pohnpei Theater will remain open is if the Etscheit family, which is quite large and extended, decides to keep underwriting the theater on behalf of the community. End Comment.
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